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In The

Supreme Court of the United States

October Term, 1958

No. 839

EARL E. WRIGHT, Jr., et al.,

Petitioners,

—v.—

THE UNITED STATES,

Respondent.

PETITIONERS' REPLY BRIEF

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Statement

The Government contends (br. p. 10) that under *Armour* and *Skidmore*, the result reached in a given case must depend upon its peculiar facts; that the alleged conflicts between the Courts merely reflect the factual situations involved in those cases, that (p. 6) this case does not present any new general question calling for review by this Court and that (p. 8) the Court of Claims correctly held that sleeping and eating time is not compensable even though petitioners were subject to call during such time.

It is the burden of this reply brief to demonstrate (1) that the court below held as a matter of law that there can be no recovery in any case for sleeping and eating time, regardless of the facts; (2) that a new general question has been presented for review by this Court consisting of the judicial construction of the Pay Act, made below for the first time by any court, that the statute forbids compensation for sleeping and eating time, and

(3) that the decision below is in conflict with the applicable decisions of this Court and with the decisions of the Courts of Appeal in certain circuits.

ARGUMENT

1. The case at bar holds sleeping and eating time non-compensable as a matter of law.

There was no resolution of facts peculiar to petitioners' case to determine whether "time spent lying in wait for threats . . . is spent predominantly for the employer's benefit . . .", (323 U. S. at 133) The Court of Claims said only:

> "On the authority of the opinion in *Merlin M. Armstrong et al* v. *United States*, No. 145-56 this day decided • • • plaintiffs' petition is dismissed." (Ap. 1a)

Although plaintiffs' petition was dismissed on the authority of *Armstrong*, there was no determination hat the facts of petitioners' case are the same as, similar to or different from Armstrong's facts. Apart from the words "Upon the authority of the opinion in *Merlin M. Armstrong et al* v. *United States*" the decision below is silent as to Armstrong. But it is plain from the opinion in *Armstrong* (Ap. 2a) that the Air Force firefighters in that case were not, as is the case with petitioners, employed under Naval Administrative Regulation N. C. P. I. 85.4-4 which provides that "Standby status and standby duty are synonymous. Both mean 'work' for pay purposes, whether the employee sleeps or idles away his time while awaiting a call to perform actual work".*

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* The government contends (footnote, p. 11) that the petitioners reliance on this regulation is misplaced, and that the correct meaning of the regulation is found in Section 4-5x which excludes sleep-

Without reference to the facts of this case the court below read the two-thirds rule into the statute as follows (Ap. 1a):

> "Compensation for two-thirds of the 24 hours plaintiffs were on duty seems to us to be a sensible construction of the Federal Employees Pay Act of 1945 (59 Stat. 295)."

Under that constructiton the facts are academic, and the statute controls. The construction of a statute is a matter of law and not the resolution of facts.

If the decision below is permitted to stand on the case books as authority, it becomes useless to determine

> "Whether, in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. * * * Each case must stand on its own facts." (323 U. S. at 136-37, 140).

for the compelling reason that whatever the facts may be, the "sensible construction of the Federal Employees Pay Act of 1945" limits compensation by statute in all cases.

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ing time under the "two-thirds" rule. The answer to this contention is that the "two-thirds" rule was in effect prior to *Armour* and was superseded by 4-4 to conform to Armour, and 4-4 so states. Sleeping time which was theretofore excluded under the "two-thirds" rule is expressly made compensable by 4-4.

In another footnote (p. 8) the Government refers to a proposed amendment to the Pay Act (S. Rep. 687, 85th Cong., 1st Sess. p. 2) based upon the understanding of the Senate Committee, that overtime would not be paid for time allowed for sleeping and eating during overtime assignments. The Report shows that the proposed language of the amendment, relied on here by the Government, was adopted by the Committee at the request of the Civil Service Commission. Despite the request of the Commission and the Senate Committee's Report, both the House and the Senate refused to enact that provision into law.

The Court of Claims has thereby laid down a rule of law, of general application, enunciated for the first time by any court, that one-third of the time on duty is not compensable under the Pay Act which declares that all hours of employment are compensable.

This raises a new federal question of general application, and constitutes a complete and adequate answer to the Government's suggestion (br. p. 6): "It does not present any new general question, nor is it in conflict with any other decision (each of which depends upon its own particular facts), and, accordingly, further review here is not called for."

Finally, the Government's position that (p. 9) "A recovery of this kind would be unprecedented and contrary to the consistent practice under both the Fair Labor Standards Act and applicable federal pay statutes," is the plainest concession that "consistent practice" requires the denial of compensation for sleeping time regardless of the facts.

This can scarcely be said to be in harmony with *Armour* and *Skidmore*.

2. *Armstrong's* case holds sleeping and eating time to be non-compensable as a matter of law.

The Court of Claims interpreted this Court's decision in *Skidmore* to mean that the question of fact to be determined in each case relates only to standby time which is not sleeping time, and that as to sleeping time, as such, there could in no circumstance be a recovery. Thus, in construing *Skidmore*, the Court below said (Ap. 4a)

> "It [the Supreme Court] did not specifically decide whether or not recovery could be had for time spent in sleeping and eating, but it clearly intimated that *it could not be.*" (Emphasis added.) (Matter in brackets supplied.)

Thereupon the Court below, after observing that "since these decisions (in *Armour* and *Skidmore*) employees have been compensated for standby time although no work was performed therein, but they have been denied compensation for time spent sleeping and eating", and that "It has been generally understood that this was in accord with the *clear intimation of the Supreme Court* in the above cases that an employee was not entitled to compensation for time spent in sleeping and eating" and after also observing that "This has been the uniform holding of our Court", the Court of Claims then disposed of the question of the compensability of sleeping and eating time upon legal *authority* as distinguished from the particular facts of the Armstrong case as follows:

> "There is thus respectable authority for the exclusion of sleeping and eating time from time spent on the employer's premises: first, the contract between employer and employee, involved in the *Gaetke* case; second, the Civil Service Commission regulation; third, the ruling of the Comptroller General; fourth, the decisions of the Court of Appeals of the Seventh Circuit, and of this court; and, fifth, the clear intimation of approval by the Supreme Court in *Skidmore* v. *Swift & Co. supra.*"

There was no determination in *Armstrong* whether "Facts may show that the employee was engaged to wait or waited to be engaged" (323 U. S. at 136).

In addition to the aforesaid five categories of authority for the exclusion of sleeping time from compensable time, the Court of Claims held in *Armstrong* as a matter of law that sleeping time is not compensable under the Pay Act because Congress did not intend to include sleeping time in the statutory words "hours of employment". Thus, (Ap. 2a-3a):

> "The *basic question* presented is *what Congress*

> *meant* by the words 'hours of employment'. Did it intend to include therein time during which an employee was required to remain on the employer's premises but during which he could eat or sleep?". (Emphasis added.)

The congressional intent was thereupon construed below as follows (Ap. 7a):

> "When Congress passed the Federal Employees Pay Act, we doubt it had in mind the peculiar situation of firefighters, but it does not seem to us reasonable to suppose it meant to compensate an employee merely because he was required to sleep and eat on the employer's premises instead of at home."

Thus the Court of Claims adopted the concept that sleeping time may not be work. That is precisely the concept that was rejected by this Court in *Skidmore*, when, in reversing the holding of the Court of Appeals in the Fifth Circuit that "One must sleep whether at home or abroad, nor is he at work when he is asleep. . . . 'Working' is not synonomous with 'availability for work'.", this Court declared (323 U. S. at 140):

> But in this case, although the District Court referred to the Administrator's Bulletin, its evaluation and inquiry were apparently restricted by its notion that waiting time may not be work, an understanding of the law which we hold to be erroneous. Accordingly the judgment is reversed and the cause remanded.

3. Reply to Government contention that there exists no conflict of decision.

The Government contends (p. 6) that this Court in *Armour* and *Skidmore* held that the question cannot be resolved on the basis of any legal formula, but is a question of fact to be resolved by appropriate findings of the trial court in the light of all the circumstances, and (p. 7) quotes to that effect from *Armour* as follows (323 U. S. at 133):

> "Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treaetd by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case."

On this point the Government also quotes (p. 7) from *Skidmore* (323 U. S. 136-7) as follows:

> "Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by the trial court. * * * Each case must stand on its own facts."

Omitted from the foregoing quotation (represented by asterisks) is the following:

> "This involves scrutiny and construction of the agreement between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all the surrounding circumstances. *Facts may show that the employee was engaged to wait or waited to be engaged.* His compensation may cover

> both waiting and task, or only performance of the task itself. Living quarters may in some situations be furnished as a facility of the task and in another as a part of its compensation. The law does not impose an arrangement on the parties. It imposes upon the Courts the task of finding what the arrangement was." (Emphasis added.)

It is clear from the quotation in *Armour* that the test as to whether "readiness to serve" has been hired, is a factual determination as to "whether time is spent predominantly for the employer's benefit" and it is equally clear from the quotation in *Skidmore* that the test is a determination whether "Facts may show that the employee was engaged to wait or waited to be engaged."

Diametrically opposed to this concept is the decision of the Court of Claims which holds it to be "the clear intimation of the Supreme Court" that there cannot be a recovery for sleeping and eating time, that the Congress did not intend to include such time as hours of employment, and that a sensible construction of the Pay Act is that only two-thirds of the time on duty is compensable.

Under the decision below each case no longer rests on its own facts and it is no longer necessary to determine, as in *Armour*, whether the time was spent predominantly for the employer, or, as in *Skidmore*, whether the employee was engaged to wait or waited to be engaged, because the decision below holds statutory construction and the clear intimation of the Supreme Court to make such factual inquiries superfluous.

The decision below is not only in direct conflict with *Armour* and *Skidmore*, but also with *General Electric Co.* v. *Porter* (CA 9-1953), 208 F. 2d 805; *F. W. Stock & Sons* v. *Thompson* (CA 6-1952), 194 F. 2d 493, and each of the cases in the 5th, 8th and 9th circuits cited on page of the petition.

It scarcely requires argument to demonstrate the conflict. The Court in the Ninth Circuit in *General Electric*

supra, held that the employees were engaged to wait and said simply it is "our holding that the firemen are entitled to compensation for sleeping and eating time", whereas the Court of Claims has held in this case and in *Armstrong* that there can be no recovery in any case for sleeping and eating time. This direct conflict of decision runs not only to the Ninth Circuit, but to each of the mentioned circuits which have held such time to be compensable.

CONCLUSION

The Court of Claims has read into the statute the "two-thirds" rule and has read out of the Administrative Regulations NCPI 85.4-4. It has held that a sensible construction of the Pay Act precludes recovery at any time and in any case for sleeping and eating time on standby duty. A new question of general application has clearly been presented which has not been but should be settled by this Court.

The petition for certiorari should therefore be granted.

Dated, New York, May 19, 1959.

Respectfully submitted,

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